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Sent: Sunday, November 27, 2005 1:15 AM
To: ATR-Real Estate Workshop; FTCDOJworkshop@realtors.org
Subject: Re: "Competition and the Real Estate Workshop" -- Comment,
Project No. V050015

Antitrust Division
U.S. Department of Justice
Liberty Place, Suite 300
Attention: Lee Quinn
325 7th Street, NW
Washington, DC 20530

November 26, 2005

Re: "Competition and the Real Estate Workshop" -- Comment, Project No.
V050015

The Internet Listing Display Policy of the National Association of REALTORS® will limit choice for consumers and restrict innovation and implementation of new business models in the real estate industry.

Many of the policy's provisions are irrational and impractical. For example, see section I, paragraph #2 regarding security protections - the participant, apparently on demand, must turn over an audit trail to the MLS without stating any "probable cause or evidence" of an infraction, only suspicion. This vital business intelligence can't be turned over to anyone without extremely stringent guidelines and protections for the Participant.

The main crux of the ILD policy lies with Section I, paragraph 3 regarding Opt Out. At first blush, it seems that the first provision prevents an Opt Out Brokerage from framing or otherwise displaying the listings of competitors on its website. However, the section goes on to grant permission for the Opt Out to display its inventory on REALTOR.COM (which also now feeds AOL.com). The inventory of REALTOR.COM shows inventory of ALL participants regardless of their opting status. Why should REALTOR.COM be permitted to show 100% of the inventory; yet a local broker be prevented from showing 100% of the available inventory, regardless of opt status? Should REALTOR.COM be granted this monopoly or discretion regarding who else besides them is entitled to place all inventory on their website? If REALTOR.COM can show 100% of the available inventory of an mls, then every other participant should be able to as well.

Participants should NOT be granted the option of opting out of the ILD policy.

What's at stake with the VOW/ILD debate is the profitability of the business model used to attract the buyer. All the distractions about "Models of competition" and MLS's not being public utilities, and the "win-win" deflect the attention from the main thrust of the ILD and Competition issue. That issue is profitability. Although ILD and Competition are relevant issues in our industry, the real threat to profitability is the emergence of the web-based referral companies. The focus of this letter, however, is directed to ILD and Competition.

First, I find it rather irksome that NAR has spoon-fed its membership with "talking points" we can use in our letters to the DOJ. However, NAR makes it easy for me to formulate a response based on their

positions.

(http://www.realtor.org/law_and_policy/mls/ild/regulator_letters.html)

/Point 1: Real estate is a model of competition/

/Nothing encourages a competitive business environment more than providing consumers with choice. In the residential real estate marketplace, consumers not only are able to choose from more than 76,000 brokerage firms and more than 1.2 million REALTORS®, but also from a variety of business models./

Never forget there are two types of Realtors, Listing Realtors that represent sellers, and Selling/Buyer Realtors that represent buyers. Although they work together to achieve a closing, they are natural adversaries. Should the interests of one type of Realtor be superior or subordinate to the other? Regarding business models, should there be limits placed by NAR or the DOJ on the type of model offered to each type of consumer, namely the buyer or the seller? Who's to say what kind of business model is best for over 76,000 brokerage firms? Maybe the best model is the one that works best for the interests of both buyer and seller; and not necessarily for the best interests of the Buyer Broker or Listing Broker.

/Point 2: MLSs are cooperatives, NOT public utilities The MLS is a cooperative, broker-to-broker offer of cooperation and compensation that help both brokers and customers buy and sell homes. It is not a public utility, nor should it be. /

/The beauty of the MLS is that it allows real estate brokerages of every size to compete on a level playing field. It gives all of us access to an inventory of property listings that we are able to show and sell to our clients. /

/The MLS doesn't discriminate. All MLS members are treated equally, regardless of their size or their business model, and yet the rights of property owners and their listing brokers are respected. The rules of the MLS achieve a delicate balance between respecting the rights of listing brokers so they will continue to be willing to contribute their inventory of listings and permitting cooperating brokers the ability to show those listings and be assured of receiving compensation if they bring about a successful sale./

Many elements of NAR's spoon-fed point are essentially correct, but their points do not reflect the day to day reality of real estate brokerage. The third paragraph lacks depth. Certainly property owners and listing brokers have rights to be respected.

But here is a very key point: if a buyer walks into an office and asks for a roster of all homes that fit their criteria; they will get one. Further, if the buyer asks for more detail on certain properties, they will get that data as well. This is appropriate and uncontested as the correct way to serve a buyer, regardless of the Listing Brokerage.

What the ILD policy wants to do is prevent a brokerage from providing the same level of service to a buyer who visits the brokerage website, rather than walking in the door. This is a straightforward contradiction to NAR's point #1, as the MLS's will restrict the variety of business model(s) that a website visitor can use. The ILD policy will require the buyer to physically visit the brokerage in order to get

the information they seek.

How is the buyer better off with such a restriction on their access to information? How is the seller better off if they lose the interest of a buyer simply because the buyer didn't want to make the trip to the office? This may be rather trivial on a local basis, but if a home is for sale in Seymour, Indiana and the buyer is browsing from their co-op in New York; well visiting my office isn't the most convenient thing for that buyer.

If I choose to utilize a business model that permits buyers access to MLS information via my website, is a buyer better off? Is the seller better off? Of course they are; or at least they are no worse off.

This leads nicely to NAR's point #3

*Point 3: */The new ILD policy is a win-win for consumers and REALTORS®
From my perspective, the new policy is a win-win for consumers and REALTORS®./

This is NAR's viewpoint and not mine. Their "win-win" is not true when you break down consumers into a buyer and a seller; and break down a Realtor into a Buyer Broker and Listing Broker.

Does the buyer care who the listing broker is? Does the selling broker care who the listing broker is? The answer for both questions is no. If you think the answer is yes, why do you think it should matter?

Every listing in the mls indicates what compensation the buyer broker is to receive; and by interpolation, it also shows the listing broker what they can expect to net if they sell it out-of-house. Does the listing broker care who sells to the buyer?

If the goal is to get the house sold, the listing broker should be satisfied to sell out-of-house (as evidenced by the property's placement in the mls); and even happier to sell the property in-house and get 100% of the commission.

What's at stake with the VOW/ILD debate is the profitability of the business model used to attract the buyer.

If the buyer buys the property using the VOW business model as a starting point, the VOW operator will get to keep the commission offered in the mls. The listing broker is going to get paid just like they always have, under the basic tenets of the mls. If the listing broker is the VOW operator, then 100% of the commission stays in-house. If the VOW operator is a competitor, then the competitor will get the advertised commission in the mls, and the listing broker will get the remainder.

When the listing broker placed the property in the mls, they accepted the risk of an in-house or out-of-house sale. As soon as the property goes into the mls, the broker has determined what their net will be should it be sold out-of-house. With proper (efficient) planning by the listing broker, the sale will cover their marketing expense and have a profit left over, regardless of whether it's in-house or out-of-house. If out; the profit will be smaller; if in, the profit will be greater.

Until an offer is accepted, the listing broker has no idea whether the selling broker will be in-house or out-of-house. Should the listing broker market the home differently if they suspect that a VOW operator

Buyer Broker might sell the house? I think not.

VOW operators represent a new business model that traditional competitors and big franchises perceive as a threat to their profitability. By following the money, it becomes evident that listing brokers have a clear motivation to restrict business model innovation - innovation could seriously threaten to reduce the percentage of in-house (100% commission retention) sales. VOW operators represent a threat to the existing "in/out" sales ratio of traditional brokerages, and therefore their profitability. Keep in mind, however, that the VOW operator seeks no more compensation other than that advertised in the mls by the listing broker in the first place.

But so what?

Again - who is better off? If the buyer and seller incur no financial damage; then they should be indifferent with respect to any ILD or VOW policy. Under the VOW business model I can see no financial damages to a buyer or seller.

Is the listing broker incurring financial damage by paying the commission they clearly indicated and agreed to pay when they put the property in the MLS and it sells out-of-house? No. Is the Buyer Broker incurring financial damage by collecting only what was advertised in the MLS? Again, no.

The VOW business model represents a threat to the existing "in/out" ratio of traditional brokerages, and therefore their profitability. How can a traditional brokerage protect their "in/out" ratio? They can either eliminate the threat that alternative business models pose by working to legislate the threat away by enacting restrictive policies and rules designed to discourage or eliminate innovative business models; or they can "take their toys (i.e. listing inventory) and start a new game" by opting out.

Regardless of the choice that the traditional brokerage makes - one must consider if the consumer is better off (or at least no worse off) based on that choice.

If there is a convincing argument that the decision by a listing brokerage to quit or opt out of the mls is beneficial to anyone other than the listing brokerage, I've yet to hear it, and I've been paying close attention.

Giving the listing brokerage the option to opt out is far from "win-win" and would be detrimental to the interests of everyone except the listing brokerage. Suppose a brokerage quit the mls because they didn't want an alternative business model to use their listing information on their website. Imagine if every buyer broker had to negotiate a fee with the listing broker PRIOR TO EACH AND EVERY SHOWING of that listing broker's property? It's nightmare enough to schedule viewings, but to negotiate commissions too? (Remember, non-mls participants are not compelled to pay any commission whatsoever.) In many markets, there is a dominant brokerage. If that office opts out or quits the mls and forces me to negotiate my commission; what if they refuse to negotiate? Should that dominant brokerage be able to exert monopolistic/oligopolistic power over my business by offering me zero or very little compensation? Do I work for no compensation and still represent the best interest of the buyer and let them buy one of their listings? Should I force the buyer to sign an Exclusive Buyer Agency contract with my fee plainly stated, then ask the seller to pay the fee

as a closing expense? Do I turn the buyer loose and let them go to that brokerage? Suppose something goes wrong; what constructive actions could I take against a non-mls participant?

Is granting an opt-out provision to a dominant broker (included in all brokers) good for the seller? The buyer? The VOW business model operator? The only entity that benefits from an opt-out is the listing broker; everyone else receives no benefit.